IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No 208 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and
MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DY.COMMISSIONER OF I.T.(ASST)

Versus

HARJIVANDAS JUTHABHAI

Appearance:

MR MANISH R BHATT for Petitioner

MR Mehta for Respondent

CORAM : MR.JUSTICE B.C.PATEL and
MR.JUSTICE K.M.MEHTA

Date of decision: 17/11/1999

ORAL JUDGEMENT

(per Patel,J):

1. Admit. Mr.Mehta appears for respondent and waives service of notice of admission. At the request of learned advocates appearing for parties matter is taken

up for final disposal today.

2. This appeal is preferred under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") against the order made by the Income Tax Appellate Tribunal, Ahamedabad (hereinafter referred to as "the Tribunal") on 15.12.1998 confirming the order passed by the Commissioner of Income Tax (Appeals)(hereinafter referred to as "CIT(Appeals)").

3. It transpires from the record that on 11.6.1986 a survey operation was carried out by the Revenue under the provisions contained under section 133A of the Act at the business premises of the assessee and two diaries were seized wherein sales were recorded for a period of seven months. It is on the basis of these diaries the Revenue was of the view that the turnover was of Rs.65,11,756/-. It transpired that profit at the rate of 14% was considered, and the assessee declared extra income of Rs.22 lacs in respect of endorsement mentioned in the order. The Revenue was of the view that the entire amount should be taxed. The assessee submitted that the total sales of seven months may be of Rs.65,11,756/-, but the same figure can not be treated as taxable income. In the instant case, figures of sales have been mentioned and in some cases value of transaction is in excess of Rs.2,500/-. It was demonstrated before the lower authority that in fact on the basis of sale of articles of a limited amount along with profit earned on that sale again articles were prepared and sold. Again adding the profit of newly prepared articles, articles were prepared and were sold. There was a chain for a period of seven months of such transactions and in view of this it was submitted that on the total sales, tax can not be levied. The CIT(Appeals) as well as the Tribunal have taken into consideration this aspect and considering 14% as profit disposed of the matter. However, while passing the order, the Tribunal made certain observations which compelled the revenue to file this appeal.

4. Under the circumstances, the following question is raised:

> "Whether the tribunal having held that promissory estoppel does not operate against the statute it could have thereafter held that the order under Section 132(5) of the Act would be final for the purpose of assessment under section 143(3) of the Act?

5. Section 132(5) of the Act contemplates an

opportunity to be given to the person concerned of being heard. It further contemplates that within 120 days of the seizure an order may be made by the Assessing Officer with the previous approval of the Deputy Commissioner, estimating the undisclosed income (including the income from undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as available with him, calculating the amount of tax on the income so estimated in accordance with the provisions of this Act. The section empowers to retain in his custody such assets/or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to in clause (ii) (iia) and (iii) of Section 132(5) of the Act and forthwith release of the remaining portion, if any, of the assets to the person from whose custody they were seized.

6. In the instant case the Assessing Officer estimated the undisclosed income in a summary manner based on his judgment on the basis of material available and calculated the amount of tax on the income so estimated. The Commissioner of Income Tax (Appeals) as well as the Tribunal were of the opinion that once the Deputy Commissioner has approved the calculation of amount of tax and the income estimated as undisclosed income, it was not open for the Assessing Officer to take a different view. In other words, the Tribunal expressed an opinion that the Assessing Officer was not entitled to take a different view than the view taken by the Deputy Commissioner in absence of other fresh material. If Sub-clause (5) of Section 132 is read minutely it becomes clear that within 120 days from the date of seizure there must be an order with the approval of the Deputy Commissioner estimating the undisclosed income in a summary manner. It was contended by the Revenue that this is only estimation and that too in a summary manner and it would be open for the assessee to satisfy the Assessing Officer that the estimate made by the Revenue is not correct by placing evidence if any. It was submitted that it is open for the Assessing Officer to take a different view on the basis of material available, i.e. he may come to different conclusion from the material available. It was submitted that merely because in a summary manner to the best of his judgment on the basis of material as available the undisclosed income is estimated, and, that the Assessing Officer has on the basis of estimated income has calculated the amount of tax it does not mean that while making an order A.O has to record the finding similar to that recorded under section 132(5) of the Act while making an order under section 143(2) of the Act. Commissioner of Income Tax

(Appeals) expressed the view that in absence of any further material, contrary view ought not to have been expressed by the A.O. Approval is granted on the basis of material and after application of mind. The CIT as well Tribunal expressed the view that when no other material was found at the time of assessment under Section 143(3) of the Act and the order is to be passed only on the basis of material already collected and considered while granting approval under Section 132(5) of the Act, then the estimate as made should not be disturbed. What is urged before us is that the approval under Section 132(5) should not be considered as direction. Tribunal expressed the opinion that in absence of any other material, contrary view ought not to have been taken. The views were expressed on the facts placed before the Tribunal.

7. It is undisputed that the order under section 132(5) operates in a different field. The order made under Section 132(5) of the Act is not final and conclusive for all the purposes. The approval under Section 132(5) of the Act can not be treated as a direction. May be, on facts the order passed under Section 132(5) of the act with the approval may be required to be followed while making an order under section 143(3) of the Act. While making an inquiry, on finding of further material the Assessing Officer may require to take a different view and therefore in reality it is not correct to say that the approval under Section 132(5) of the Act is in the nature of direction. The Tribunal was of the view that the order made by the Assessing Officer on the basis of material available which has got approval after application of mind could not be disturbed without additional substantive material.

8. The Tribunal in para 16.1 agreed to the proposition that there was no promissory estoppel against the statute. The Tribunal arrived at a conclusion that as no other material was found at the time of assessment proceedings under section 143(3) of the Act it was not open to ignore the directions given under section 132(5) of the Act. We are required to state that section 132(5) of the Act does not contemplate any direction but contemplates previous approval of Deputy Commissioner and that too before the assessment proceedings are concluded. Approval has nothing to do with the assessment as contemplated under section 143(3) of the Act. Therefore, we are of the view that though on material placed on record the Tribunal has committed no error in its ultimate conclusion, but has erred in making observations in para 16.1. The Tribunal ought not to have confirmed

the opinion expressed by the Commissioner of Income Tax (Appeals) in para 10 of the order in so far it relates to approval under section 132(5) of the Act to be treated as direction.

9. We were taken through the record. Mr.Mehta, Learned counsel appearing for the respondent took us through the relevant part of the paper book with a view to point out that on facts, the view taken by the tribunal is not required to be interfered.

10. We are of the opinion that so far as the final conclusion is concerned, no interference is called for. However, in view of the above facts and circumstances, our answer would be in negative, i.e. in favour of revenue.

11. Appeal stands disposed of accordingly. Under the circumstances, no order as to costs.

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